EXHIBIT 3
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HB 249

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Testimony in Opposition to House Bill 249
(Property Tax on Perpetual Conservation Easements)

To: House Taxation Committee, Montana Legislature

From: Andrew C. Dana, Esq.

Date: January 22, 2009 (Room 472)

Mr. Chairman and Committee Members: My name is Andrew Dana. I am an attorney from Bozeman who for the last 17 years has specialized in conservation easement law. I have represented numerous landowners who have granted conservation easements in Montana. I currently represent a number of land trusts throughout Montana and Idaho, and I consult nationally about conservation easement law. My family and I also own a ranch on the Yellowstone River in Park County that is subject to a perpetual conservation easement.

I appear today on my own behalf, not in a representative capacity, in opposition to House Bill 249. I oppose HB 249 for many reasons, but I want to mention three fatal defects in this bill:

1. **HB 249 would violate the Equal Protection Clause, Article II, Section 4, of the Montana Constitution.**

The Equal Protection Clause, Article II, Section 4, of the Montana Constitution states, simply: "No person shall be denied the equal protection of the laws." The most fundamental axiom of equal protection law "is that persons similarly situated . . . must receive like treatment" from the government. State of Montana, Department of Revenue v. PPL Montana, LLC, 2007 MT 310, 340 Mont. 124, 172 P.3d 1241. The Montana Supreme Court has ruled that "the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." Powell v. State Compensation Ins. Fund, 2000 MT 321, 302 Mont. 518, 15 P.3d 877.

With respect to property taxes, the Supreme Court has specifically stated that the creation of a class of property owners whose taxes are assessed at a higher level than the taxes of those of similarly situated property owners "causes property owners in the first class to pay a disproportionate share of the state's property taxes, in violation of the right to equal protection of the laws guaranteed by Article II, Section 4 of the Montana Constitution." Roosevelt v. Department of Revenue, 1999 MT 30, 293 Mont. 240, 975 P.2d 295. *See also* Allegheny Pittsburgh Coal v. County Commission of Webster County (1989) 488 U.S. 336, 345-46.

What does HB 249 propose to do? It would impose a special, unique, punitive property tax only on taxpayers who hold perpetual conservation easements, but on no other kind of easement or servitude authorized under Montana law. For example, HB 249 does not impose any property taxes on:

- **Trail easements** acquired and held for public benefit by the state or local governments or by non-profit groups.
- **Access easements** to improve public hunting opportunities acquired and held by the state or local governments or by non-profit groups.
- **Environmental Control Easements** created under Section 76-7-101, et seq., MCA (modeled, in part, on the Open Space Land and Voluntary Conservation Easement Act, Section 76-6-101, et seq., MCA.)
- **Any of the 20 types of easements** that may be created under Section 70-17-101, MCA, or **any of the 7 types of easements** that may be created under Section 70-17-102, MCA, including conservation servitudes which were authorized in the same legislation as our conservation easement enabling act.

All of these easements are property interests that "run with the land," which means that they may last in perpetuity – just like conservation easements – if the holder so chooses. Yet, HB 249 treats all of these easements, as well as other partial interests in land, differently than it treats conservation easements.

Therefore, HB 249 would create a new class of taxpayers -- conservation easement holders -- who are similarly situated with other owners of easements in Montana but who do not have to pay this new punitive property tax on their easements. HB 249 is a discriminatory tax on its face, and it patently violates the equal protection clause of the Montana Constitution.

2. HB 249 would tax conservation easement property at more than 100% of the taxable value of comparable lands that do not have conservation easements on them.

Conservation easements do not create new rights. Conservation easements are partial property interests that are granted by owners of land to the state, to local government, and to qualified non-profit organizations. So, conservation easements simply represent a reallocation of landowners' property rights between the landowners and the governmental entities or non-profit groups that hold conservation rights granted to them. Importantly, this reallocation of rights does not change the state's property tax revenues. Section 76-6-208, MCA, requires that conservation easements must be property tax neutral. Conservation easements do not change the tax rates or the effective taxation of the properties over which they are granted.

Yet, HB 249 seeks to impose a ***new additional tax*** on real property. That is, HB 249 leaves existing taxes paid by landowners intact but adds a new tax imposed on the same land assessed against the conservation easement.

- HB 249 would therefore cause tax to be collected on more than 100% of the taxable market value of properties subject to conservation easements.

Aside from being offensive, and, again, discriminatory, this "double taxation" scheme violates the plain language of both (i) Section 15-6-134, MCA, which requires taxes on Class 4 property to be assessed at no more than 100% of "taxable market value," and (ii) Section 15-7-103, MCA, which requires the state and the Department of Revenue to develop "an equitable and uniform basis of assessment of land for taxation purposes." How can a tax that is assessed on more than 100% of market value be "equitable"?

In the past, the Montana Supreme Court has repeatedly struck down tax systems that seek to impose taxes at greater than 100% of a property's taxable market value. Roosevelt v. Department of Revenue, 1999 MT 30, 293 Mont. 240, 975 P.2d 295; Department of Revenue v. Sheehy (1993), 262 Mont. 104, 862 P.2d 1181; Department of Revenue v. Barron (1990), 245 Mont. 100, 799 P.2d 533. Based on the principles of tax fairness and equity, HB 249 would immediately be invalidated by the courts for assessing property at substantially more than 100% of its taxable market value, unlike other comparable properties across the state.

3. HB 249 proposes to tax a property interest that cannot be accurately and fairly assessed under Section 15-8-111, M.C.A., which sets forth the methodology the Department of Revenue must use when assessing taxes on Class Four property.

Finally, assuming HB 249 is enacted into law, conservation easements have no taxable market value against which property taxes may be based under Montana law. Section 15-8-111, MCA, establishes three methodologies by which property taxes must be assessed on Class Four property. First, the state may use ***market value***, which is the value at which property would change hands between willing buyer and willing seller. But, conservation easements are not traded. There are no willing buyers and sellers. In fact, if non-profit groups traded in conservation easements they would almost certainly lose their tax-exempt status or be assessed an unrelated business income tax, since their organizational missions require them to hold conservation easements for public benefit in perpetuity.

Second, under certain limited circumstances the state may sometimes use ***cost approach*** as an approximation of value for assessing property taxes. But, very, very few conservation easements are purchased at full value. Most conservation easements are donated. Of the others, most are purchased at steep discounts with public funds. Accordingly, it is virtually impossible

for the Department of Revenue to devise a fair system of taxation when most easement holders have no virtually costs – or, at best, wildly discrepant costs -- associated with their acquisition of conservation easements. Furthermore, the Montana Supreme Court has strongly warned against basing property tax valuations solely on property acquisition costs. In the Roosevelt case, the Supreme Court stated flatly: "Montana does not have an "acquisition value" system of taxation."

Third, under Section 15-8-111, MCA, the state may use ***capitalization of net income*** to determine property values for the purpose of taxation. Yet, easement holders derive no income at all from their conservation easements. Instead, conservation easements represent pure liabilities for easement holders. Landowners retain all rights to derive income from their easement protected property. Conservation easement holders typically only have rights to prevent activities of others that harm the conservation rights they hold for the benefit of the public. Accordingly, the income capitalization methodology is useless for valuing conservation easement, since conservation easements produce no income.

Thus, under Montana law there is no valid means of assessing a taxable value for conservation easements. HB 249 therefore seeks to impose a tax on conservation easement property that simply cannot be valued.

Summary

For all of the foregoing reasons, **I urge the Committee to vote against this proposed new tax** because it violates the Montana Constitution, it imposes a punitive and inequitable tax of over 100% of market value, and because the value of conservation easements cannot be fairly and accurately assessed under Montana law.